

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP75
STATE OF WISCONSIN**

Cir. Ct. No. 2009PR000595

**IN COURT OF APPEALS
DISTRICT I**

KENNETH DRAGOTTA, SPECIAL ADMINISTRATOR,

APPELLANT,

v.

**ESTATE OF HENRY WILLIAM PATRICK WITTBROT, III, LISA
WITTBROT, PERSONAL REPRESENTATIVE,**

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Kenneth Dragotta, the Special Administrator for the Estate of Henry William Patrick Wittbrot, III, appeals from the circuit court's order: (1) dismissing the Special Administration; (2) retitling to the Wittbrot heirs

property located in Dodge County and bank accounts previously titled to the W316 Children Trust; and (3) ordering Dragotta to personally pay \$3515 to opposing counsel. Dragotta's argument is twofold.

¶2 First, he claims that the circuit court improperly exercised its discretion when it dismissed the Special Administration and ordered Dragotta to pay \$3515 for opposing counsel's attorney's fees due to Dragotta's failure to prosecute the Special Administration. Dragotta claims that any failure to prosecute was not egregious and, if so, was not his fault. We conclude that Dragotta's failure to prosecute the Special Administration for approximately eighteen months was egregious.

¶3 Dragotta, individually named as the Special Administrator for the Estate, did nothing to search for Estate assets for eighteen months, despite three court hearings and court orders for progress reports. Furthermore, Dragotta presented no "clear and justifiable excuse" for his inaction. See *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 276, 470 N.W.2d 859 (1991), *overruled on other grounds by Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶61, 299 Wis. 2d 81, 726 N.W.2d 898. His attempts to blame his attorney for the failure to prosecute are belied by the record, which shows that Dragotta knew and was complicit in the failure to prosecute and was not "blameless." See *Marquardt*, 299 Wis. 2d 81, ¶¶62-63, 80. Accordingly, we affirm the sanctions order dismissing the Special Administration and awarding actual attorney's fees against Dragotta.

¶4 Second, Dragotta argues that the circuit court erred in ordering that the Dodge County property and the Children Trust bank accounts be retitled in the names of Wittbrot's heirs. With respect to the Dodge County property, Dragotta

claims on appeal that the circuit court erred by not ordering “an appraisal or fair market value analysis,” but Dragotta forfeited this issue by not raising it before the circuit court.¹ We need not address issues raised for the first time on appeal. *See Townsend v. Massey*, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155. As to Dragotta’s complaint regarding the circuit court’s order to retitle the Children Trust bank accounts, Dragotta fails to develop it. We need not develop his argument for him. *See League of Women Voters v. Madison Cmty. Found.*, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285. Accordingly, we conclude that the circuit court properly exercised its discretion in ordering the retitling of these assets as part of the dismissal sanction.

BACKGROUND

¶5 Dragotta appeals the circuit court’s order dismissing a Special Administration, which Dragotta, President of Systems Engineering & Automation Corporation and Systems Engineering Company, Inc. (“Systems Engineering”), had opened in an effort to find assets belonging to Wittbrot.² Before Wittbrot

¹ Dragotta raised no objection at the hearing where the circuit court entered the order retitling the Dodge County property, and he filed no post-judgment motion for reconsideration on that issue.

² The circuit court opened the Special Administration pursuant to WIS. STAT. § 867.07 2013-2014, which states, in relevant part:

Grounds for appointment of special administrator.
Whenever it appears by petition to the court that a person has died and the court would have jurisdiction for the administration of the person’s estate, the court may appoint a special administrator if it appears that:

....

(continued)

died, Systems Engineering had obtained a judgment against Wittbrot's company. Because the judgment was unpaid at the time of Wittbrot's death, Dragotta sought payment from Wittbrot's Estate.

¶6 Systems Engineering filed a claim against Wittbrot's Estate in the amount of \$1,462,040. Dragotta signed the claim. Although Systems Engineering initially filed objections to closing the Estate without payment of its debt, on January 12, 2012, the day set for the contested hearing, Systems Engineering withdrew its objections and the circuit court closed the Estate.³ Final judgment on the Estate was entered on February 9, 2012.⁴ Neither Systems Engineering nor Dragotta appealed that decision.

¶7 On February 26, 2013, one year after the Estate had been closed, Dragotta petitioned the probate court to appoint him Special Administrator to the Estate and to give him the powers "to investigate and settle claims related to decedent's property discovered after entry of final judgment in the probate matter including real and personal property transferred by decedent prior to death without adequate consideration to the determinent [sic] of the decedent's known

(2) The final judgment of distribution in the estate has been entered and an act remains unperformed in the estate, or that unadministered assets have been found or may be found belonging to the estate.

³ Dragotta failed to include a transcript of the January 12, 2012 hearing in this record; however, he does not dispute that Systems Engineering withdrew its objection to closing the Estate. Additionally, the official CCAP probate court record confirms that Systems Engineering withdrew its objection to the closing of the Estate. Therefore, we find that fact uncontroverted.

⁴ The Honorable Jane Carroll presided over the relevant part of the Estate through its closing and also opened the Special Administration. Due to judicial rotation, the Special Administration was then reassigned to the Honorable David L. Borowski, who entered the final order from which Dragotta appeals.

creditors.” On April 17, 2013, the circuit court granted the petition and issued a Letter of Special Administration to Dragotta personally, giving him exactly the powers he sought.

¶8 On April 23, 2013, the Personal Representative of Wittbrot’s Estate sought an order removing Dragotta as Special Administrator. In his response brief to that motion, Dragotta argued that he had found real property in Dodge County, which should have been included in the Estate assets and which had “commercial value.” Dragotta claimed that he was currently having the property appraised. He also claimed that the Children Trust bank accounts contained assets that belonged in the Estate, excluding assets that were given to Wittbrot’s children as funeral gifts.

¶9 The Personal Representative countered that the Dodge County property was inadvertently excluded from the Estate, had minimal value, and was a legally permissible gift to two of Wittbrot’s children made in order to exclude a third child from getting a share. With respect to the Children Trust bank accounts, the Personal Representative argued that the accounts were under the excludable minimums for inclusion in the Estate, but more importantly, contained funeral gifts to Wittbrot’s children, a fact easily verified by the checks that were written *after* Wittbrot’s death. Copies of the checks were attached.

¶10 On June 25, 2013, the circuit court denied the Personal Representative’s motion to remove Dragotta as the Special Administrator and to dismiss the Administration and granted Dragotta’s request for more time to search for undisclosed or improperly transferred assets. Dragotta was present at the hearing and was represented by counsel.

¶11 A year went by with no action on the record. A status hearing was held on August 14, 2014. Counsel for Dragotta appeared almost an hour late, claiming he had made a calendaring error. Opposing counsel complained that Dragotta had done nothing to search for assets in the subsequent year. Dragotta's counsel conceded that not enough had happened in Dragotta's search for assets in the previous four to six months. Nonetheless, he asked for another forty-five day delay. The court agreed to the adjournment but told counsel to file a written proposal for how this matter was to close. A hearing date was set for October 14, 2014, at which time the court would expect Dragotta to show that he had taken some action on his search for assets.

¶12 At the October 14, 2014 hearing, counsel for Dragotta failed to appear. Instead, Dragotta appeared in the company of a new attorney, who said he was not prepared to represent Dragotta, but had come along as a friend of the court. The attorney told the court that Dragotta had called him that morning saying he suspected counsel of record would not show because they were having a fee dispute. After waiting approximately an hour, the court contacted counsel of record by phone. The court then adjourned the matter to November 12, 2014, giving Dragotta time to resolve his attorney dispute. The court intended to decide at that hearing whether to dismiss the Special Administration. The circuit court stated: "Bottom line this case [sic] nothing has happened since I think it was June or July of last year So I'm displeased with you, displeased with your client and that's putting it mildly." A day after the October 14, 2014 hearing, Dragotta's counsel withdrew and new counsel was formally substituted.

¶13 At the November 12, 2014 hearing, Dragotta's new counsel asked for more time to conduct discovery. The circuit court denied that request and found that Dragotta had done nothing in the previous eighteen months to discover

assets, wasting the court's time and opposing counsel's time over the last three hearings. The circuit court determined that the Dodge County property Dragotta had found, more than eighteen months previously, had little or no value based on the undisputed annual real estate bill of \$117. Further, the court found that the Children Trust bank accounts contained funeral gifts to Wittbrot's children. The court then dismissed the Special Administration, ordered Dragotta to pay opposing counsel's attorney's fees as a sanction for the delays, and transferred the assets to Wittbrot's heirs. Dragotta appeals.

DISCUSSION

¶14 Dragotta raises two issues on appeal. First, he argues that the circuit court erroneously exercised its discretion when it dismissed the Special Administration as a sanction for Dragotta's failure to prosecute the action. Second, he argues that the circuit court erred in retitling the Dodge County property and the Children Trust bank accounts to the Wittbrot heirs. We address each in turn.

I. The Circuit Court's Sanction of Dismissal Was a Proper Exercise of Discretion.

¶15 We note at the outset that although Dragotta generally states that the circuit court erred "in dismissing the Special Administration of the Estate and imposing sanctions on Kenneth Dragotta," he only develops an argument opposing dismissal. He fails to articulate any argument or cite any authority supporting his assertion that the attorney's fees sanction was an improper exercise of discretion. Additionally, he fails to make any mention at all of the reasonableness of the fees order. We will not develop his argument for him. *See League of Women Voters*, 288 Wis. 2d 128, ¶19. Thus, we focus solely on the dismissal sanction.

¶16 Whether to impose a sanction and what type of sanction to impose are decisions we review for an improper exercise of discretion. *Schultz v. Sykes*, 2001 WI App 255, ¶8, 248 Wis. 2d 746, 638 N.W.2d 604. Our discretionary analysis follows well-settled law: A discretionary decision will be sustained if the circuit court has “examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). The party aggrieved by the sanction decision has the burden of establishing that the circuit court has erroneously exercised its discretion. *See Johnson*, 162 Wis. 2d at 273.

¶17 Here, the circuit court’s stated reason for the sanction was Dragotta’s failure to prosecute the Special Administration. A circuit court has both a statutory and inherent power to sanction for failure to prosecute and for a failure to obey court orders. *Id.* WISCONSIN STAT. § 805.03 (2013-14)⁵ grants the circuit court the authority to impose “just” sanctions for failure to prosecute or for failure to obey any order of the court and expressly contemplates dismissal as a sanction.⁶

⁵ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

⁶ WISCONSIN STAT. § 805.03 states, in relevant part:

Failure to prosecute or comply with procedure statutes. For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order....

Section 805.03 also permits any of the sanctions listed under WIS. STAT. § 804.12(2)(a), but does not limit sanctions to those listed. Dismissal of an action or proceeding is included on the list of permissible sanctions in § 804.12(2)(a)3.⁷

¶18 Whether a dismissal sanction is “just” under WIS. STAT. § 805.03 depends on whether the record shows that the noncomplying party’s conduct was “egregious” and whether there was a “‘clear and justifiable excuse’ for the party’s noncompliance.” *Johnson*, 162 Wis. 2d at 276-77 (“[W]e will sustain the sanction of dismissal if there is a reasonable basis for the circuit court’s determination that the noncomplying party’s conduct was egregious and there was no ‘clear and justifiable excuse’ for the party’s noncompliance.”). Here, the record supports the circuit court’s conclusion that Dragotta’s conduct was egregious.

¶19 The circuit court dismissed the Special Administration due to Dragotta’s failure to prosecute. The court found that Dragotta had done nothing to search for assets for approximately eighteen months. Further, despite three court hearings at which Dragotta had asked for repeated adjournments, Dragotta failed

⁷ WISCONSIN STAT. § 804.12(2)(a) states, in relevant part:

If a party or an officer, director, or managing agent of a party or a person designated under s. 804.05(2)(e) or 804.06(1) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under sub. (1) or s. 804.10, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

....

3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]

to show any actions in the search and failed to obey the court's order to file a plan for closing the Special Administration.

¶20 On appeal, Dragotta disputes the circuit court's factual finding that he failed to do anything in the approximately eighteen months leading up to the November 12, 2014 hearing. He relies on his motion and affidavit, filed before that hearing, in which he averred that he had taken the following actions:

- He served subpoenas;
- He commenced depositions;
- He paid for bank records and service of process; and
- He sought information.

However, his own affidavit and supporting documents prove that Dragotta had done nothing for approximately eighteen months prior to the November 12, 2014 court hearing. The documents showed that:

- The subpoena was served on July 1, 2013;
- The deposition was taken on June 20, 2013;
- The payments for bank records and service of process date from June 2013; and
- The search for information was undated and not specific.

¶21 Dragotta also claimed at the November 12, 2014 hearing that in the previous eighteen months he found the Dodge County property and took a deposition. But it is undisputed that he discovered the Dodge County property prior to April 23, 2013, and that he took the deposition in June 2013.

¶22 In sum, Dragotta has failed to show that the circuit court erroneously exercised its discretion when it found that Dragotta failed to prosecute the Special Administration for approximately eighteen months.

¶23 The circuit court's conclusion that Dragotta's failure to prosecute was egregious is also supported by several undisputed facts in the record. First, the delays over the three hearings wasted valuable judicial resources and added unfair costs to the opposing party in attorney's fees. Additionally, on two occasions, delays were exacerbated by Dragotta's fee dispute with his counsel—a fact Dragotta knew about and even anticipated, yet failed to resolve. A final egregious factor is Dragotta's failure to obey the court's August 2014 directive to file a plan to close out the Special Administration. Dragotta did not file the plan at either the October or November 2014 hearings, continuing to ask for delays. The record shows as well that Dragotta had ample opportunity *before* the eighteen months to search for assets and with only two exceptions—the Dodge County property and the Children Trust bank accounts, both found before May 2013—he found nothing.

¶24 When the circuit court dismissed the Special Administration on November 12, 2014, it found:

I think under the circumstances of this case, the totality of the circumstances, the fact that this estate has been opened since 2009, the fact that there's no evidence that there are actually any assets, any appreciable assets in this estate, the fact that this is, frankly, a court of equity, I'm granting the motion to dismiss the special administration. I'm granting the request for sanctions against Mr. Dragotta. He caused the last three hearings, so I expect counsel to submit actual attorney's fees. They're to be paid by Mr. Dragotta within 10 days of my signing off on the order.

As part of that order, I want that release of assets to the bank account, the release of any information or assets related to this property or this quarry, that has little or no value, the bank accounts and the assets are to be released to the children. The special administration is being dismissed.

¶25 We conclude that the record clearly shows that Dragotta's failure to prosecute the Special Administration was egregious conduct and that the circuit court's finding to that effect is one that a reasonable judge could make. See *Marquardt*, 299 Wis. 2d 81, ¶2.

¶26 In so holding, we reject Dragotta's argument that his behavior was not egregious because he has a clear and justifiable excuse for his actions. See *Johnson*, 162 Wis. 2d at 276-77. Dragotta offers two excuses for his failure to prosecute: (1) he claims he actually did search for assets in the eighteen months prior to the court's order; and (2) if he did not, it was not his fault because the circuit court failed to give him sufficient powers and his attorney failed to keep him informed about the case.

¶27 We have already rejected Dragotta's assertion that he did not fail to prosecute the Special Administration. His second claimed excuse has two parts. First, Dragotta argues that as Special Administrator he lacked the proper powers to find assets, get a valuation on the Dodge County property, or to investigate the Children Trust bank accounts. We reject these claims because Dragotta was the petitioner on the Special Administration and was granted the powers that he asked for. He could have asked for other powers and did not. He asked for subpoena power and other discovery powers. The circuit court granted those powers but Dragotta did nothing with them, and he never asked for other powers. Dragotta has not met his burden of showing a clear or justifiable excuse with regard to his claim of inadequate powers.

¶28 Dragotta asserts that only his lawyer was to blame because his lawyer did not tell him about the court dates or orders, did not communicate with him, and did not timely file a motion to withdraw. But Dragotta was not blameless. Dragotta argues that because *his personal* conduct was not egregious or in bad faith, the circuit court erred in imputing the egregious conduct to him and sanctioning him. We disagree.

¶29 A client seeking to avoid imputation of the attorney's egregious conduct to himself must show that the client acted in a reasonable and prudent manner in managing the attorney. *Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis. 2d 707, 728, 599 N.W.2d 411 (Ct. App. 1999). In determining whether the client acted reasonably and prudently, we review the record to see if the client knew of, or was complicit in, the egregious conduct. *See Id.* Only if the client is "blameless" does the circuit court err in imposing the dismissal sanction. *See Marquardt*, 299 Wis. 2d 81, ¶¶62-63, 80. A client is not blameless simply because he did not directly cause the conduct. *Id.*, ¶64. Rather, the test is whether the client knew of the conduct, or should have known, and did not act reasonably to manage it. *See Id.*, ¶68.

¶30 In *Marquardt*, the client argued, as Dragotta does here, that it was unaware that its lawyers had failed to respond to discovery, unaware of the court hearings, and that when it found there was a problem, replaced the lawyers. *Id.*, ¶57, 67-68. Our supreme court noted that the record supported the circuit court's findings that the client had attended some of the hearings where his attorney's failure to respond to discovery was addressed and that the client's own affidavit showed that it should have questioned his attorney's conduct. *Id.*, ¶66. Thus, the supreme court concluded that the record provided a sufficient basis for the circuit court's conclusion that the client knew or had reason to know that its lawyer was

failing to properly manage the case and the client failed to act reasonably to manage the lawyers. *Id.*, ¶68.

¶31 Similarly here, Dragotta was present in court and was aware of the circuit court's orders and its displeasure with the failure to search for assets. Additionally, Dragotta was complicit because, as the named Special Administrator, he had the power to conduct a search for assets himself and did not. His personal failure to act was not a failure to respond to discovery—a lawyer's job, like in *Marquardt*—but a failure to search for assets—a job within Dragotta's province as the named Special Administrator. And finally, Dragotta was aware of and complicit in the failure to resolve his fee dispute with his lawyer.

¶32 The circuit court reached a reasonable decision that Dragotta was not blameless, and accordingly, we affirm the circuit court's discretionary decision to impose the dismissal sanction for failure to prosecute.

II. The Circuit Court Properly Retitled Assets as Part of the Dismissal Order.

¶33 Finally, Dragotta argues that the circuit court improperly exercised its discretion in retitling the Dodge County property without an appraisal or fair market value analysis and in retitling the Children Trust bank accounts. As we have already stated, Dragotta failed to preserve the Dodge County property issue, and thus, forfeits it. *See Townsend*, 338 Wis. 2d 114, ¶25. Further, Dragotta failed to develop any argument explaining why the circuit court's decision regarding the Children Trust bank accounts was error, nor did he cite to any authority to support that position. We will not develop his arguments for him. *See League of Women Voters*, 288 Wis. 2d 128, ¶19.

¶34 Nonetheless, in the interest of completeness, we address the part of the dismissal sanction order that retitled the assets. Although the circuit court did not expressly say so, the record shows that this was a necessary and proper exercise of discretion to resolve title and inheritance issues that remained as a corollary to the dismissal of the Special Administration.

¶35 The record shows that, after the Estate was closed, the Personal Representative realized that she could not find the necessary supporting trust document for the Dodge County property. She produced documents showing the decedent's intent to gift that property before death to two of his three children. As to the Children Trust bank accounts, the Personal Representative produced copies of all of the checks and claimed almost all were written after the decedent's funeral as gifts to his children. Dragotta produced no evidence to dispute any of these claims.

¶36 So, at the time the Special Administration was dismissed, the above assets were in legal title limbo and of minimal value, as the circuit court properly and fairly noted. The court found the Dodge County property to be of little or no value based on the annual tax liability of \$117. The circuit court concluded that the Children Trust bank accounts contained funeral gifts to them and were also of little value. Dragotta presented no evidence to dispute either value finding. Accordingly, the court properly ordered these assets released to Wittbrot's heirs. This was a decision a reasonable judge could reach, and we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

